LEGISLATIVE COMMISSION ON STATUTORY MANDATES
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February 3, 2011

Via U.S. Mail and mscclerk@courtsmi.gov.us

Mr. Corbin Davis
Clerk, Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48900

Re: ***ADM File No. 2010-5***

Dear Mr. Davis:

This is to provide the Court with comments from the members of the Legislative Commission on Statutory Mandates concerning the proposed amendments to Michigan Court Rules 2.112, 7.206, and 7.213, pursuant to the Court's order of December 21, 2010.

As noted in the Staff Comment to the proposed rule changes, the five members of this Commission recommended these amendments in their December 3, 2009 Report in order to remove the ambiguities that exist in the court rules and improve upon the efficiency with which the Court meets its responsibility under §32 of the Headlee Amendment to the State Constitution "to enforce" the provisions of the Amendment. We strongly support the adoption of these rule changes.

Proposed Amendment to MCR 2.112

The Commission's recommendation for changes to MCR 2.112 is intended to conform the process of litigating Headlee cases pending in the Court of Appeals to the court rules that apply in circuit court to all other forms of civil litigation. While it is acknowledged that the 2007 amendment to MCR 2.112 (by adding subsection (M)) specifies requirements for pleading claims under §29 of the Amendment, the fact remains that there is nothing in the court rules that supplies direction to litigants as to how the cases are to be processed while pending in a court that functions as an appellate court in the normal

course. While part of this challenge can be addressed with the proposed amendments to MCR 7.206, discussed below, the fact remains that such issues as discovery, pre-trial motions, and other pre-trial functions that are fully addressed for suits pending in circuit court, are not addressed in the court rules for cases filed in the Court of Appeals under §32 of the Amendment. The Commission recommends that rather than leaving this void or creating a new set of rules of procedures for these cases, this problem can be simply resolved by simply specifying that these suits are subject to the same court rules that apply for suits pending in circuit court with the exceptions specified in MCR 7.206 and 7.213, discussed below.

The Commission is also well aware from the "comments" to the Rule of the strong differences of opinion between members of this Court that arose when the 2007 amendment to MCR 2.112 was approved. With respect to the majority's view, questions as to the type and extent of harm, presently required to be pled in the taxpayer's complaint in subsection (M) of the rule, can be addressed efficiently through discovery. This can be done in the context of the taxpayer's request for relief in the pleadings (declaratory judgment, injunction, mandamus or dollar damages) and with due consideration of the respective burdens of proof in terms of establishing whether the State has failed to meet its funding responsibilities under §29 of the Headlee Amendment.

This change will maintain the well settled notion, embedded in the court rules, that Michigan is a "notice pleading" State, MCR 2.111(B)(1) and (2). It will also eliminate any perception that this Court is making taxpayers' claims under the Headlee Amendment more difficult to initiate than exists for other civil claims. Indeed, if it develops during the course of the litigation that the taxpayers' claims are defective, deficient, or otherwise insufficiently stated, following adoption of the proposed rule, those shortcomings will undoubtedly be addressed through a summary disposition or other appropriate motion, as is true for other forms of civil claims.

The comment that the Court of Appeals is not well equipped to function as a trial court in carrying out a trial court's responsibilities is certainly conceded. This challenge can be addressed in a way which minimizes that burden without imposing undue burdens on those taxpayers wishing to exercise their right to original jurisdiction which arise through §32 of the Amendment. For that reason the Commission's recommendations for changes/additions to MCR 7.206, discussed below, accompany the recommended changes to MCR 2.112. The Court can minimize the burden on the Court of Appeals through the assistance of a special master, as described below.

Proposed Amendments to MCR 7.206

The Commission recognized that while the Court of Appeals is given original jurisdiction in §32 to enforce the provisions of the Headlee Amendment that court nonetheless functions, with limited exceptions, as an appellate court. Article 6, §8 of the Michigan Constitution which creates the Court of Appeals does not specify that the court is to solely function as an appellate court, but in light of Article 6, §1 of the Constitution where the Court is identified as an "appellate court" and by operation of legislation and court rules, it functions as the intermediate appellate court of the State and not as a trial court of general jurisdiction.

This Court focused on this dichotomy in 1984 in the course of granting leave to appeal in the *Durant* case. The Court directed counsel to submit argument on, among other issues, how this dilemma should be resolved. The Court directed counsel to brief "[w]hat judicial procedure should be

followed by the Court of Appeals in taking evidence and reaching a decision in this case." *Durant v Dep't of Ed*, 419 Mich 933, 355 NW2d 11 (1984).

In the subsequent decision on appeal the Court concluded that where there are disputes of fact in Headlee cases brought in the Court of Appeals, such as in *Durant*, they may be referred to a special master for purposes of hearing the disputed facts and rendering a report to the court upon which judgment may be entered in compliance with §32. *Durant v State Bd. Of Educ*, 424 Mich 364,394; 381 NW2d 662,675 (1985).

This holding has been followed in the few Headlee cases that followed *Durant* over the last 25 years. However, the court rules have never been amended to expressly provide for this procedure in Headlee cases. A practitioner confronted with representing a taxpayer and local unit of government with a claim under §29 of the Amendment would need to track the evolution that has occurred in these cases to understand that such a process is available. Reviewing the Court rules would not enlighten that practitioner.

The Commission concluded in its December 31, 2009 Report, at pp 6-11, that this should be resolved through several reforms, including amendments to the court rules that expressly define an orderly proceeding, including resort to a special master where disputes of fact exist or it otherwise facilitates the court's handling of the suit. It is submitted that this reform will serve the underling concept of §32 of the Headlee Amendment to expeditiously hear and resolve claims under the Amendment, particularly under §29 of the Amendment.

As we concluded these changes to the court rules should serve to achieve what the voters originally intended through providing recourse to the Court of Appeals at the point of original filing, i.e., to expedite proceedings that would otherwise occur if the suits were filed in circuit court. While there can be reasonable dispute about the wisdom of this aspect of the Headlee reform, there should be no mistaking the voters' objective through §32.

Proposed Amendment to MCR 7.213

While the Commission recommended in its report that suits filed under §32 of the Headlee Amendment be given priority "over non-emergency matters pending before the Court," its members have no objection to the order of priority established in the proposed amendment to MCR 7.213.

Conclusion

The Headlee Amendment contains several controls designed to place checks or controls on the otherwise unrestrained increases in taxation that were occurring during the period prior to being voted upon on in November of 1978. Some of the controls applied to state government and others applied to local units of government. Section 29, a frequent subject of Headlee litigation to date, places a value on the notion that if state government requires local units of government to provide costly services it should bear the costs of what is required. This notion is expressed in §25 of the Amendment as follows: "The state is prohibited from requiring any new or expanded activities by local governments without full state financing … or *from shifting the tax burden to local government." (*Emphasis added).

The concern that the Commission seeks to address through these court rule changes deals with the fundamental idea that if non-compliance occurs, taxpayers should have ready access to the courts "to enforce" the provisions of the Amendment alleged to have been violated. The idea, for better or worse, was that by eliminating a layer of the court system (i.e., circuit courts) and providing access originally to the Court of Appeals, taxpayers' claims would be more expeditiously resolved. The Commission's goal was to reduce the barriers to achieving that objective.

Very truly yours,

LEGISLATIVE COMMISSION ON STATUTORY MANDATES

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